

LEGAL TIDES

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Welcome to the inaugural issue of *Legal Tides*, a publication from the new North Carolina Coastal Resources Law, Planning and Policy Center.

The center was established in 2004 through a cooperative agreement by the UNC School of Law, North Carolina Sea Grant and the UNC Coastal Studies Institute to provide timely and usable legal and planning information to coastal managers, communities, businesses and citizens. The center serves the citizens of North Carolina by bringing together the research resources of the law school, the research and outreach experience

of the Sea Grant program, and the coastal connection provided by the Coastal Studies Institute to address contemporary coastal issues.

The increasing development pressure on coastal lands and waters raises issues that involve federal, state and local laws, regulations and ordinances. *Legal Tides* will explore legal and planning issues as they relate to North Carolina's coastal area and the Atlantic Ocean. Articles will present a balanced and informative analysis of issues. We also will attempt to keep our readers up-to-date on the latest publications, workshops and conferences that pertain to coastal and ocean law and policy.

Legal Tides is a free publication distributed to interested coastal citizens. Primarily written for a legal and policy audience, we hope to craft the publication to appeal to all readers. Please, let us know what you think.

If you would like to continue to receive *Legal Tides*, contact Walter Clark at walter_clark@ncsu.edu or (919) 515-1895. Or, write to: *Legal Tides*, North Carolina Sea Grant, Box 8605, N.C. State University, Raleigh N.C. 27695-8605. Also, please let us know if you would prefer receiving *Legal Tides* in electronic format.

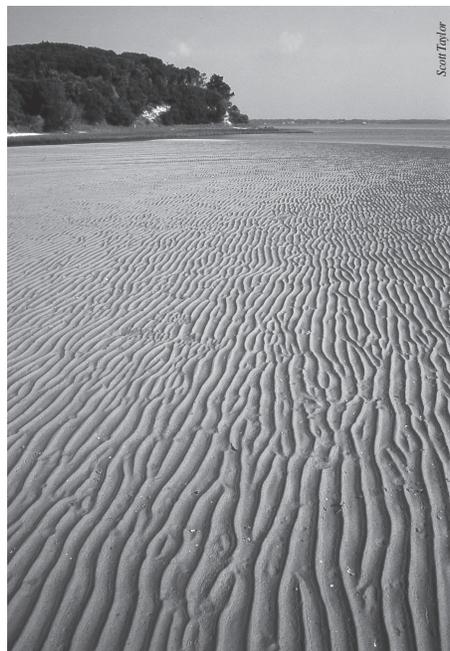
The Rights of Oceanfront Property Owners in the 21st Century

BY JOSEPH KALO AND WALTER CLARK

“Membership has its privileges” — and so does the ownership of waterfront property. With the ownership of waterfront property comes a set of unique property rights. But, unlike other types of property, waterfront property abuts a public resource infused with public-use rights. Consequently, the special rights accorded waterfront property owners must be balanced with such public rights as boating, swimming and fishing.

Identifying these special private rights of use is not always easy and has been the source of controversy since the founding of our nation. Nor is all waterfront property treated the same. The precise nature and scope of the private rights may vary depending on whether the waterfront property is oceanfront, inlet front, soundfront, riverfront or lakefront.

As we search for ways to respond to storms, coastal erosion and increasing demands upon



our already crowded shores, an understanding of the scope and extent of the private and public rights in ocean and inlet shorelines is becoming more important and pressing.

*In the next two issues of *Legal Tides*, we will explain the nature and evolution of unique rights possessed by ocean- and inlet-front property owners. These rights, often referred to as littoral rights, have not been explored as thoroughly as riparian rights — a term that is often associated with landowners along rivers and sounds.*

*In this first issue of *Legal Tides*, Joseph Kalo, Graham Kenan Professor of Law at the University of North Carolina Law School, and Walter Clark, Coastal Communities and Policy Specialist at North Carolina Sea Grant, will begin the journey by explaining the origin and evolution of littoral rights. In the next issue we will examine how “artificial” additions to shorelines impact shoreline ownership and littoral rights.*

Introduction

For much of North Carolina's history, the rights of oceanfront property owners have been loosely defined. This was due in part to the slow pace of development of much of the state's oceanfront shoreline. Consequently, there were fewer opportunities for conflict between oceanfront property owners, the state and the general public. All that changed in the latter half of the 20th century. In the past 50 years, the barrier islands and ocean beaches have seen a marked increase in development. This has occurred in conjunction with severe erosion caused by hurricanes, nor'easters, sea level rise and man-made activities, such as dredging and building jetties.

The waters of the Atlantic now are lapping at the foundations of million-dollar oceanfront homes, condominiums, hotels and businesses. The result is the demand that the state protect these investments by re-establishing erosion-prone beaches through beach nourishment projects or by permitting owners of threatened structures to build protective seawalls or otherwise harden the shoreline. In light of these ongoing changes, it is timely and appropriate to take a serious, detailed look at the littoral rights of oceanfront property owners and how those rights are balanced with the rights of other littoral owners and the needs of society.

The Origin of Littoral Rights

The concept of littoral and riparian rights is a product of evolving 19th century American jurisprudence. At the beginning of this evolution, waterfront property owners possessed no special rights.¹

Owning waterfront property made it easier to gain access to the water, but access could be cut off by the state at any time without compensation

By the beginning to the 20th century, this had completely changed with the law supporting the view that waterfront property owners possessed unique and valuable rights of which they could not be deprived without compensation.

In 1903, the North Carolina Supreme Court,



Scott Taylor

Who Is a Littoral Owner

The key to any discussion of littoral rights is an understanding of who is a littoral owner. It is not necessarily true to assume that anyone owning "oceanfront" or "inlet front" property is a littoral owner with littoral rights. Whether someone is a littoral property owner depends upon whether the ocean or inlet forms at least one boundary of the property. In order to be a littoral owner, the oceanfront owner's title must run to the mean high

water mark.³ If the mean high water mark is not one of the legal boundaries it is not littoral property and there are no littoral rights associated with it, even if the land appears to front the ocean or inlet.

If the property is littoral, then the property owner has the legal right of immediate and direct access to the ocean. It is this feature that commands the premium typically paid by investors for oceanfront property. But, this right exists only as long as the oceanfront property owner is a littoral owner. Therefore having and maintaining the mean high water mark as one boundary is important to ocean- or inlet-front property owners.

Littoral Ownership, Moving Shoreline

The ocean and inlet shorelines are in constant motion, expanding and contracting through natural cycles and processes. The high water mark may be in a very different location from the day the property is purchased to a few weeks or years later. Traditionally, title to the area landward of the mean high water mark is in the oceanfront owner and title to the area seaward of that mark is held by the state as public trust submerged lands.⁴ So how is an ocean property line determined in this dynamic environment? As a general common law rule, when natural cycles and processes result in additions (accretions) to the beach, the increase belongs to the oceanfront owner to whose shoreline the accretions adhere; if the cycles result in erosion of the shoreline, then the oceanfront owner sustains the loss. In other words, the oceanfront property owner's boundary is never fixed, but is always a shifting, ambulatory boundary line — moving as

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in Shepard's Point Land Co. v. Atlantic Hotel,² listed the rights associated with the ownership of North Carolina waterfront property as:

- The right to be and remain a littoral or riparian property owner and to enjoy the natural advantages conferred upon the land by its adjacency to the water;
- The right of access to the water, including a right-of-way to and from the navigable part;
- The right to build a pier or "wharf out" to the navigable water, subject to any state regulations;
- The right to accretions to land; and
- The right to make reasonable use of the water flowing past the land.

Coastal conditions have changed in the 100 years since the Shepard's Point decision. With these changes have come new court decisions and laws affecting the rights of coastal property owners. Consequently as we begin the 21st century, two important questions arise:

- Does the traditional list of rights enumerated in Shepard's Point accurately describe the rights of ocean- and inlet-front property owners in North Carolina today?
- Have modern uses of oceanfront property given rise to any new rights?

natural coastal processes change the contours of the shoreline and the intersection of the mean high water mark with the shore.

Exception to Common Law

Traditional common law rules do not always insure that the mean high water mark will remain the ocean- or inlet-front boundary. If the accretion or erosion of the shoreline is slow and gradual, the mean high water mark (as noted above) moves with those changes. But the traditional common law rule is different when shoreline change is the result of a sudden, dramatic shift brought about by the hammering of waves from a hurricane or nor'easter. In legal terms this shift is called avulsive change. According to common law, when sudden, powerful and natural forces cause a sudden and perceptible change in the contours of the shoreline, the seaward boundary of ocean- or inlet-front property does not move.

So what would this mean if, for example, during a storm fifty feet of sand is added to the beach? According to the traditional rule, the oceanfront owner would not own the new, expanded 50 feet of beach. Instead, the owner's oceanfront property line would remain where it was before the storm. In such a circumstance, the ocean no longer would be the seaward property boundary and technically, the owner no longer would be a littoral owner and would not possess any littoral rights. So, according to traditional common law, avulsive changes could result in the loss of arguably the most valuable feature of oceanfront property ownership — direct contact with (and access to) the ocean. The addition to the shoreline would belong to the state and be a part of the state's public lands consequently destroying the littoral owner's right of direct access to the ocean.

Legislative Changes, Traditional Rules

Fortunately, state legislation in the 20th century discarded the avulsion rule with respect to additions to the shorelines of ocean- and inlet-front property. North Carolina General Statutes (NCGS)146-6(a) and

77-20(a) create a uniform approach to all natural changes in ocean shorelines. NCGS 146-6(a), states:

If any land is...by any process of nature... raised above the high water mark of any navigable water; title thereto shall vest in the owner of that land which, immediately prior to the raising of the land in question, directly adjoined the navigable water...

Any "process of nature" includes hurricanes, nor'easters, wind and wave action and is not limited to slow, gradual additions to the shoreline. Therefore, this statute clearly changes the common law avulsion rule governing additions to shorelines.

But what happens when a storm erodes 50 feet of the shoreline? Under the traditional rule, the property line would be where it was before the storm — 50 feet out in the water and the ocean- or inlet-front owner would own 50 feet of submerged land. But this traditional rule no longer applies to oceanfront property. NCGS 77-20(a) states in plain, unambiguous language that the "seaward boundary of all property..., which adjoins the ocean, is the mean high water mark." In other words the mean high water mark remains the

The ocean and inlet shorelines are in constant motion, expanding and contracting through natural cycles and processes. The high water mark may be in a very different location from the day the property is purchased to a few weeks or years later.

seaward boundary regardless of changes in the contours of the shoreline and regardless of whether the changes are the product of processes of erosion and accretion or the result of avulsion.

Standing alone section 77-20(a) may appear inapplicable to inlet front property because technically such property does not "adjoin the ocean." However, a 1998 legislative change in section 77-20 suggests that the word "ocean" now includes "ocean inlet waters." In 1998, the General Assembly amended section 77-20 by adding subsections (d) and (e). These sections define the term "ocean beaches" and affirm the public's common law right to use ocean beaches. Section 77-20(e) defines "ocean beaches" as "the area adjacent to the ocean and ocean inlets." This suggests that the General Assembly intended the term "ocean" as used in section 77-20(a) to include ocean inlet waters.

There is no reasoned basis to distinguish ocean- and inlet-front property, especially since the tidal waters of the Atlantic flow past each, both are subject to the same storm and wind action, and the demarcation between the two is a somewhat arbitrary determination of where the ocean ends and the inlet begins.⁵ Therefore a uniform rule should be applicable to ocean- and inlet-front property.

If section 77-20(a) is not applicable to inlet front property, additions to the shoreline would belong to the owner of the inlet front property based on subsection 146-6(a) which does not distinguish between property adjoining the ocean and property adjoining inlets. Arguably, however, if 77-20 (a) does not apply, an avulsive loss of shoreline might leave the inlet property owner with title, subject to public trust rights, to newly created submerged lands.

The Loss of All Littoral Land and Rights

Sometimes gradual erosion, a hurricane, or a combination of both may result in ocean or inlet waters moving over and covering an entire lot. Unless the ocean- or inlet-front property owner can get permission from the state to fill and recover the land, title is likely lost with



the “former” owner losing all littoral rights. The owner of the next piece of property landward of the submerged land becomes the oceanfront owner and is vested with littoral rights. This is known as the rule of promotion.⁶ If, in the future, there were natural additions to the shoreline, those additions would belong to the new littoral owner not the former one. The lot once lost is not resurrected by new additions to the shoreline.

Conclusion

As the 21st century begins and North Carolina confronts the challenges of increased development along erosion-prone beaches, the legal issues of determining private rights and delineating state responsibilities become increasingly complex. In some instances, the complexity of the issues has compelled the state to move beyond the traditional common law in search of uniform answers. Determining ownership boundaries for ocean and inlet shorelines is one of these instances. With the introduction of state legislation, a fairly consistent

policy now exists to provide ocean- and inlet-front owners some assurance as to the seaward boundary of their property. Considering continuously shifting ocean and inlet shorelines, this is important, not only for oceanfront owners, but also for state managers as they attempt to ascertain the rights of the public to use one of the state’s greatest resources — our ocean beaches.

End Notes

¹ John Lewis, *A Treatise of the Law of Eminent Domain in the United States*, sec. 94, p. 116-17 (1907).

² 132 NC 517, 44 SE 39, 46 (1903).

³ It should be noted that ownership of the dry sand beach does not mean the owner has a right to exclude the public from the privately owned dry sand beach lying above the mean high tide line. The State of North Carolina contends that the public has the right to use all the natural dry sand beaches of the state. The validity of this contention is the subject of ongoing litigation. See Joseph J. Kalo, *The Changing Face of the Shoreline: Public and*

Private Rights to the Natural and Nourished Dry Sand Beaches of North Carolina, 78 N.C.L.Rev. 1869 (2000).

⁴ A. Daniel Tarlock, *The Law of Water and Water Resources*, sec. 3:35, pp 3-55 – 3-59 (2003).

⁵ The demarcation between the ocean and inlet is determined by the COLREGS (International Regulations Preventing Collisions at Sea). See Advisory Opinion concerning ownership of dredged fill and accretions on Bogue Banks at Bogue Inlet, Office of the Attorney General, September 15, 2003, n.1.

⁶ North Carolina law is not totally clear on this issue. It appears that the state follows the majority common law rule that states that once a waterbody moves across the fixed boundary of non-littoral land that land is *promoted* to littoral status and fixed boundary no longer exists. *Gould on Waters*, section 255, p. 308 (3d Ed 1900). Application of the promotion rule is consistent with the reading of relevant statutes (NCGS 77-20) and sound policy.

In the Next Edition

In the next issue of Legal Tides we will examine the effect of artificial additions to the shoreline on property ownership and littoral rights. With beach nourishment projects becoming more commonplace as a means of protecting oceanfront property, knowing the impact of artificial additions to property ownership and littoral rights is critical.

Want to Know More?

For an in-depth legal analysis of the issues covered in this and the next edition of *Legal Tides*, look for the upcoming article in the North Carolina Law Review by Joseph J. Kalo. The article is titled *North Carolina Oceanfront Property and Public Waters and Beaches: The Rights of Littoral Owners in the 21st Century*. It will appear in Volume 83, Issue 6 of the North Carolina Law Review to be published in early 2005. For additional reading on this subject, see Joseph J. Kalo, *The Changing Face of the Shoreline: Public and Private Rights to the Natural and Nourished Dry Sand Beaches of North Carolina*, 78 N.C.L.Rev. 1869 (2000).

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